

NO. PD-0254-18

FILED
COURT OF CRIMINAL APPEALS
8/2/2018
DEANA WILLIAMSON, CLERK

IN THE TEXAS COURT OF CRIMINAL APPEALS

CRAIG DOYAL,

Appellee,

VS.

THE STATE OF TEXAS

Appellant.

**ON DISCRETIONARY REVIEW FROM THE NINTH
COURT OF APPEALS DISTRICT OF THE STATE OF TEXAS
CAUSE NO. 09-17-00123-CR**

**Appellant's Motion for Extension of Time and to
Consolidate Cases on Appeal**

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Appellant State of Texas respectfully moves for a thirty-day extension of time to September 5, 2018 in which to file its Appellant's Brief on the Merits and for entry of an order consolidating the cases of State v. Riley and State v. Davenport into this appeal and, in support thereof, would respectfully show as follows:

Summary of the Motion

1. For purposes of judicial economy and consistency the Court should consolidate the cases and consider them together on the basis that they are companion cases that rest on the same arguments and testimony.
 - a. The motions to dismiss are identical.
 - b. The Reporter's Record in each case is identical.
 - c. The order appealed from in each case is identical.
 - d. While each appellee has separately briefed the issues, and the State responded accordingly, the ultimate resolution of the three cases has to be the same.
 - e. Each appellee agrees with this motion.
2. The State also moves for an extension of time in which to file its Brief on the Merits, as set out in more detail below, whether or not the Court orders consolidation of the cases.

Procedural History

Before the Trial Court

3. Defendant Doyal filed his Motion to Dismiss the Indictment on March 20, 2017 (CRD 45-67), and the State filed its Response to Doyal's Motion to Dismiss Indictment on March 21, 2017 (CRD 69-75). Defendants Charlie Riley and Marc Davenport joined in Doyal's Motion to Dismiss Indictment on March 21 and March 22, respectively. (CRR 35-37, CRMD 50-53). After about four days of testimony, on April 4, 2017, the trial court entered the orders appealed from dismissing the

indictments against Craig Doyal, Charlie Riley and Marc Davenport. The State filed notices of appeal in the cases on April 19, 2017.

Before the Court of Appeals

4. The State filed Appellant's Brief in all three cases on July 10, 2017, following the grant of two extensions of time by the court of appeals.

5. All Appellees filed their first Unopposed Requests for Extension of Time on July 31, 2017, which were granted by the Court, making Appellees' Responses to Appellant's Brief due August 21, 2017.

6. Appellee Craig Doyal filed his Response to Appellant's Brief on August 21, 2017. However, Appellees Charlie Riley and Marc Davenport each filed two additional Motions for Extension of Time, which were granted by the Court, making Riley's and Davenport's Responses due October 2, 2017.

7. Appellant requested an extension of time to file its Reply to Appellee Doyal's Response, which was granted by the Court, making Appellant's Reply to Appellee Doyal's Response also due October 2, 2017.

8. Appellees Riley and Davenport each filed their Responses to Appellant's Brief on October 2, 2017. Appellant filed its Reply to Appellee Doyal's Response also on October 2, 2017.

9. On October 11, 2017, the Court issued its Order setting oral argument in the three cases for November 9, 2017.

10. On October 16, 2017, Appellee Doyal filed his unopposed Motion to Postpone Oral Argument on the basis of conflict with the trial in another matter.

11. On October 14, 2017, the Texas Attorney General filed an identical Amicus Curiae Brief in all three cases.

12. On October 23, 2017, Appellant filed its Reply to Appellee Riley's Response and its Reply to Appellee Davenport's Response.

13. The Ninth Court of Appeals ultimately determined oral argument was unnecessary and, on February 7, 2018, issued one published and two memorandum opinions in the cases each overturning the trial court's order of dismissal. *State v. Doyal*, 541 S.W.3d 395 (Tex. App.—Beaumont 2017, pet. granted), *State v. Davenport*, 2018 WL 753357 (Tex. App.—Beaumont 2017, pet. granted) and *State v. Riley*, 2018 WL 757037 (Tex. App.—Beaumont 2017, pet. granted).

Before the Texas Court of Criminal Appeals

14. Following issuance of the court of appeals' opinions, Doyal, Riley and Davenport each filed petitions for discretionary review with this Court resulting in the three cases:

State v. Doyal, PD-0254-18

State v. Riley, PD-0255-18

State v. Davenport, PD-0265-18

15. Appellee Doyal filed his petition for discretionary review on March 8, 2018, and the Court granted the petition on June 6, 2018 with the Order also setting out that Appellee Doyal's brief was to be filed within thirty days and the State's brief due 30 days after timely filing of Appellee Doyal's brief. Appellee Doyal timely filed his brief on the merits on July 6, 2018.

16. Appellees Riley and Davenport each filed motions for extension of time to file their petitions for discretionary review on March 8, 2018 and each was granted the same day with the Court's order setting out the petitions must be filed by April 9, 2018. Appellees Riley and Davenport timely filed their petitions for review which the Court granted on June 20, 2018 with the Order also setting out that Appellees Riley and Davenport's briefs were to be filed within thirty days and the State's brief due 30 days after timely filing of Appellees Riley's and Davenport's respective briefs.

17. Appellees Riley and Davenport each filed a motion for extension of time of 30 days in which to file their briefs on the merits on July 20, 2018 which were granted the same day but extending the time to file their respective briefs only until August 6, 2018 – the same date as the State's Brief on the Merits in *State v. Doyal*.

Argument

18. For purposes of judicial economy and consistency, the Court should consolidate the cases for purposes of oral argument and the opinion issued by the Court.

19. Each case presents the precise same issues on the applicability of the First Amendment to the statute at issue in this case, Tex. Gov't Code § 551.143. Each Appellee filed his own petitions and briefs, with their particular citations and argument, but on the very same issues of level of First Amendment scrutiny and breadth of the statute. Each Appellee claims the statute is unconstitutionally vague using the same essential arguments all based upon the very same record.

20. Therefore, rather than consider these legal arguments in isolation and piecemeal, the State moves the Court to consolidate them procedurally and substantively.

21. The State also requests an additional 30 days to file its Brief on the Merits in *State v. Doyal*, and/or in the consolidated appeal if the Court so rules. Counsel pro tem for Appellant have busy practices. Among other significant matters counsel have been working on during this period is:

- a. *Gregory Sullo and Brian Zimmerman v. Felix Michael Kubosh a/k/a Kubosh Bail Bonding, Paul Kubosh a/k/a Kubosh Law Office*, Case No. 01-18-00418-CV, In the First District Court of Appeals -- a 74-plaintiff, 3-case MDL lawsuit on which the First Court of Appeals issued its opinion on mandamus in *In re Kubosh Bail Bonding*, 522 S.W.3d 75 (Tex. App.--Houston [1st Dist.] 2017, orig. proceeding and which is now again before

the First Court of Appeals on interlocutory appeals from denial of motions to dismiss under the Texas Citizens Participation Act.

22. Further, this case raises a number of complex constitutional and statutory issues that requires extensive research and analysis.

23. This is Appellant's first request for extension of time before this Court.

24. Appellee Doyal opposes this motion. Appellees Riley and Davenport are unopposed to this motion.

Prayer

The State of Texas prays the Court to consolidate cases State v. Riley, PD-0255-18, and State v. Davenport, PD-0265-18, into this case. The State of Texas further prays the Court to grant its request for an extension of time of thirty days to September 5, 2018 to file its Brief, whether or not the Court consolidates the cases, and for all other and further relief to which it may show itself entitled.

Respectfully submitted,

/s/ Joseph R. Larsen

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and

